FILED BY CLERK
JAN 14 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. MELBOURNE ROBERT AMES, Petitioner.	2 CA-CR 2009-0259-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20060004

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

The Hopkins Law Office, P.C.
By Cedric Martin Hopkins
Tucson
Attorneys for Petitioner

B R A M M E R, Judge.

¶1 In 2007, Melbourne Robert Ames was convicted of six dangerous-nature offenses: aggravated assault with a deadly weapon or dangerous instrument, unlawful

imprisonment, two counts of aggravated assault of a minor under the age of fifteen, kidnapping a minor under the age of fifteen, and first-degree burglary. The trial court sentenced him to a total of seventeen years' imprisonment: ten years' imprisonment for one count of aggravated assault of a minor under fifteen, to be served consecutively to the remaining, concurrent sentences, the longest of which is seven years. We affirmed his convictions and sentences on appeal. *State v. Ames*, No. 2 CA-CR 2007-0159 (memorandum decision filed June 30, 2008).

¶2 Ames filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., contending he had been denied a preliminary hearing to which he was entitled, his counsel was ineffective in failing to explain the state's plea offer to him adequately, and the state had failed to disclose a witness's exculpatory statement regarding Ames's participation in the crimes. The trial court summarily dismissed Ames's petition, concluding his allegations were "either untrue, or if true, would not have changed the outcome [of the trial]" and he was therefore not entitled to an evidentiary hearing. This petition for review followed.

¶3 A defendant is entitled to an evidentiary hearing on a petition for post-conviction relief if he or she presents a colorable claim. *See* Ariz. R. Crim. P. 32.8(a); *State v. Spreitz*, 202 Ariz. 1, ¶ 5, 39 P.3d 525, 526 (2002). A claim for relief is colorable if the "defendant's allegations[, if] true, might have changed the outcome." *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). We review a trial court's ruling on a petition for post-conviction relief for an abuse of discretion. *Id.* at 325, 793 P.2d at 82.

¶4 Ames first contends the trial court erred in denying him relief because, at his initial appearance, the arraignment judge had failed to apprise him of, and improperly denied him, the right to a preliminary hearing. In ruling on Ames's petition for post-conviction relief, the court observed that it was unclear whether the arraignment judge had advised Ames of this right, as required by Rule 4.2(c)(1), Ariz. R. Crim. P. It also correctly noted, however, that Rule 5.1, Ariz. R. Crim. P., does not require a hearing if the complaint charging the defendant with the commission of a felony is dismissed upon the return of a grand jury indictment. *See* Ariz. R. Crim. P. 5.1 cmt. Because Ames was indicted on the same day his preliminary hearing was scheduled to occur, the court did not abuse its discretion in concluding Ames had neither been entitled to nor improperly deprived of a preliminary hearing and therefore was not entitled to relief.

¶5 Ames next contends the trial court erred in denying relief because his initial attorney, Leo Plowman, had provided ineffective assistance in neither adequately nor accurately explaining the state's plea offer to Ames. An ineffective assistance of counsel claim requires a defendant to demonstrate: (1) "counsel's representation fell below prevailing professional norms"; and (2) "a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different." *John M. v. Ariz. Dep't of Econ. Sec.*, 217 Ariz. 320, ¶ 8, 173 P.3d 1021, 1024 (App. 2007); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). In other words, to present a colorable claim, Ames must show both inadequate performance and resulting prejudice. *See Strickland*, 466 U.S. at 687; *State v. Atwood*, 171 Ariz. 576, 600, 832 P.2d 593, 617

(1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001); *John M.*, 217 Ariz. 320, ¶ 8, 173 P.3d at 1024. "If an ineffectiveness claim can be rejected for lack of prejudice," however, "the court need not inquire into counsel's performance." *Atwood*, 171 Ariz. at 600, 832 P.2d at 617, *citing Strickland*, 466 U.S. at 697. "We will find prejudice if [a] defendant establishes a reasonable probability that the verdict in this case might have been affected by the alleged error of counsel." *Id.*

¶6 Ames attached to his petition for post-conviction relief his unsigned affidavit[1] asserting Plowman had "stated that all of the charges were still in the plea agreement," which is why Ames rejected the offer.[2] He argues that, contrary to Plowman's characterization, "the allegation of Dangerous Crimes Against Children was dropped pursuant to the plea agreement," "eliminat[ing] the consecutive sentences requirement, which would have caused [him] to accept the plea agreement."

¶7 Unlike the indictment, the plea offer did not state expressly that the offense of aggravated assault of a minor under fifteen was a dangerous crime against children. But it cited A.R.S. § 13-604.01, the statute defining and providing sentences for dangerous crimes against children, thereby putting Ames on notice that the charge was a dangerous crime against children.[3] *Cf. State v. Waggoner*, 144 Ariz. 237, 239, 697 P.2d

[1]Ames later supplemented his petition with an identical signed affidavit.

[2]This statement, if made, was clearly incorrect. The plea offer contained only five charges, whereas the indictment contained fourteen.

[3]Significant portions of the Arizona criminal sentencing code have been renumbered, 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120, effective "from and after

320, 322 (1985) (indictment's reference to statute authorizing enhancement sufficient to put defendant on notice state intends to seek enhanced sentence). Thus, the trial court would have been required to impose a sentence for this offense that would be served consecutively to the sentences imposed for the other crimes enumerated in the plea agreement.[4] § 13-604.01(K). Although the court did not reject Ames's petition on this basis, "we are obliged to uphold the trial court's ruling if legally correct for any reason." *State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002). Accordingly, Ames cannot demonstrate prejudice, and the court did not abuse its discretion in concluding he was not entitled to relief.[5]

December 31, 2008." 2008 Ariz. Sess. Laws, ch. 301, § 120. We refer to the relevant statutes as they were numbered at the time Ames committed the offenses. *See* 2005 Ariz. Sess. Laws, ch. 327, § 2 (§ 13-604.01).

[4]Moreover, the trial court could not have sentenced Ames as the plea offer provided. In light of the plea offer's citation of § 13-604.01 in identifying the offense, the plea offer inaccurately described the statutory sentencing range. It provided for seven years, 10.5 years, and twenty-one years, respectively, as the mitigated, presumptive, and aggravated terms for aggravated assault of a minor under fifteen. Pursuant to § 13-604.01, however, the correct sentencing range is ten years, seventeen years, and twenty-four years, respectively, for the mitigated, presumptive, and aggravated sentence for aggravated assault of a minor under fifteen, a dangerous offense against children. *See* § 13-604.01(D), (F), (L).

[5]Ames also contends the trial court erred in failing to hold a hearing pursuant to *State v. Donald*, 198 Ariz. 406, ¶ 14, 10 P.3d 1193, 1200 (App. 2000), to determine whether Ames understood the plea offer and the consequences of rejecting it. But his argument is predicated on the incorrect assertion that, had he understood the plea offer, he would have accepted it because it did not include any dangerous crimes against children nor require the imposition of consecutive sentences. Accordingly, even if the trial court erred in failing to hold a *Donald* hearing, Ames still cannot demonstrate prejudice.

¶8 Ames contends last that the trial court erred in denying relief because the state, in violation of Rule 15.1, Ariz. R. Crim. P., failed to disclose to him a witness statement that would have supported his duress defense. *See* Ariz. R. Crim. P. 15.1(b)(1), (3), (8). In his affidavit, Ames asserted:

> Defense counsel informed me that the statement made by [the witness] stated that [the witness] could tell that I did not want to be there (at the home) and that had I not been there, things would have been much worse for the victims. I never received a copy of [the witness's] statement.

¶9 Although Ames asserts he "never received a copy of [the] statement," he acknowledges his counsel informed him of the statement, necessarily implying counsel either had received a copy of the statement or was aware of it. Thus, his assertion does not support a conclusion the state failed to comply with Rule 15.1. And, aside from the assertion in his affidavit, Ames provided no additional evidence that the state failed to disclose the witness statement to him in accordance with Rule 15.1. Accordingly, Ames has not presented a colorable claim, and the trial court did not abuse its discretion in concluding he was not entitled to relief. *See* Ariz. R. Crim. P. 32.8; *Spreitz*, 202 Ariz. 1, ¶ 5, 39 P.3d at 526.

¶10 For the reasons stated, we grant review of Ames's petition but deny relief.

J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge